

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1085

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Respondent-Appellee,

- against -

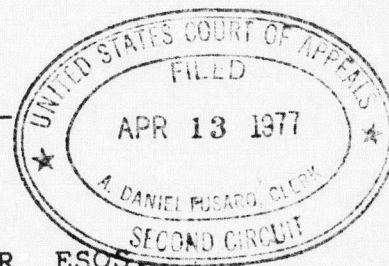
77-1085

JUAN ANTONIO ALVAREZ, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT
RAPHAEL BONILLA



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Respondent-Appellee,

- against -

JUAN ANTONIO ALVAREZ, et al.,

Defendants-Appellants.

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Docket No.
77-1085

-----X
BRIEF FOR APPELLANT RAPHAEL BONILLA

QUESTIONS PRESENTED

1. Whether the trial court erred in denying defendant's motions for severance (from the indictment and trial) because multiple conspiracies were proven, if any, and the defendant's right to a fair trial was substantially affected by the extraneous and prejudicial spillover evidence?

2. Whether the evidence was sufficient to convict on Count 1 (conspiracy) and Count 29 (substantive) and whether counsel's F.R.C.P. Rule 29 motion should have been granted?

3. Whether statements by the Government in summation amounted to prosecutorial misconduct and prejudiced the defendant's right to a fair trial?

4. Whether the Court improperly held numerous ex parte

discussions with Government counsel and ordered the record sealed without allowing defense counsel to participate?

STATEMENT PURSUANT TO RULE 28

A. PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (Owen, D.J.) rendered January 21, 1977 convicting the appellant Raphael Bonilla, after a jury trial, of two counts of violation of the narcotics laws (21 U.S.C. 812, 841(a)(1) and 841(b)(1) (A)) and sentencing him to two concurrent five year terms of imprisonment. Mr. Bonilla is presently on bail pending appeal (\$15,000 personal recognizance bond, secured by \$1,000). He was acquitted of 1 count.

B. STATEMENT OF FACTS

Raphael Bonilla was charged together with thirty-two additional persons, in a twenty-five page, forty count indictment,* alleging a conspiracy to distribute and possess narcotics, plus substantive counts. In addition two defendants were charged with a violation of 21 U.S.C. 848, engaging in a "continuing criminal enterprise." Twenty-two defendants ultimately went to trial. Seventeen were convicted

* The indictment was subsequently reduced to 30 counts.

of some or all of the charges against them and four were acquitted. The jury was unable to reach a verdict as to one defendant, Bernard Brightman, and a mistrial was declared. He was subsequently re-tried alone in February, 1977 and was acquitted of all charges. Eleven of the defendants named in the indictment were severed from the case for various reasons. Two of these individuals pleaded guilty to the conspiracy charge and later testified at the trial (Michael Parker and Ann Reynolds).

The defendants on trial were all alleged co-conspirators in a narcotics conspiracy that the Government alleged began on January 1, 1968 and ended with the filing of the indictment in April, 1976, when the defendants were all arrested.

Government counsel, both via indictment, and in its opening statement alleged that the defendants were all involved in a "massive conspiracy" to import and distribute narcotic drugs, to wit, heroin and cocaine (T. 512). It can be stated without refutation that the main witness, or the "star attraction" was John ("Jack") Brown, a 48 year-old man who by his own admissions had been addicted to heroin for years, was a regular user of cocaine up until the time of his arrest, and who had been convicted of or who had committed in fact various crimes, both State and Federal, almost too numerous to mention, namely narcotics violations, grand larceny,

tax evasion, gun violations, burglaries and perjury (T. 988-997, 1521-1542 et al.). In addition even while in protective custody of the Federal Government, he had committed drug violations in receiving heroin and in possessing cocaine (T. 1660-67). Jack Brown was also a man of hallucinations induced by his drug usage, and coupled with frequent acts of violence, usually involving the use of weapons, both in harming himself and others (T. 1372-73, 1421-22, 1541-43, 1754-62, 2196).

Michael Parker is a 26 year-old man who married Jack Brown's daughter and who became involved with Brown in Brown's heroin and cocaine business when Parker moved to New York in 1971. While Parker's involvement in Brown's drug business may have been minimal at first, he later became, through his own testimony, an integral and vital link to many of Brown's alleged buyers. Parker received money from Brown's drug transactions to live on (T. 3292 et seq.), and frequently carried a gun himself (T. 3703-08). He endeavored to portray himself as corrupted by Brown, or as "forced" into the drug trade by Brown, while at the same time having charge accounts at expensive stores and in general living a lifestyle that could admittedly not be supported except by his dealings with drugs (T. 3675-81).

Brown and Parker were the only persons out of 41 Government witnesses in this 14 week trial who offered any

testimony whatsoever about the defendant Raphael Bonilla. Witness after witness who came to the stand, some of ~~whom~~ testified for hundreds of pages, testified about other "important" or "main" defendants in this case, while only Brown and Parker mentioned Bonilla's name. In fact, in a record of 9,691 pages, direct testimony by Brown about Bonilla totalled 11 (eleven) pages (T. 1224-32, 1360, 1363), while direct by Parker about Bonilla totalled 11 (eleven) pages (T. 3380-81, 3479-85, 3537-38).

Brown testified that he knew the defendant Bonilla and that he had sold him drugs on an "of and on" basis from 1968-1973 (T. 1225-26). He did not know his true name, however, after all these alleged dealings and knew him only as "Little Michael"* or "Spanish Michael" (T. 1224). On cross-examination, however, he indicated he was mistaken on this point and did in fact know the defendant's name because he was the godfather to Bonilla's child (T. 2362). While stating that he did business with Bonilla in this "off and on" fashion, Brown specifically denied that Bonilla did "any business" whatsoever in the latter part of 1972 and early part of 1973 when Bonilla was employed (T. 2360-61). This was the exact period in the two substantive counts in which Bonilla was charged with possessing cocaine, i.e., "in

* The defendant is quite short.

and about December, 1972." In fact the drugs allegedly involved in these counts were supposed to have been delivered by Parker to Bonilla according to Parker's testimony (T. 3481-85), but Brown placed the alleged Brown-Parker deliveries as being on only one occasion in mid-June of 1972 (T. 2359), there being no testimony whatsoever by Brown of any alleged deliveries from Brown to Bonilla via Parker in the December, 1972 period. It should be noted that Bonilla was in fact acquitted of count 30 (renumbered from original indictment from 40), which alleged a December, 1972 delivery by Parker.

Parker on the other hand on direct examination, testified that he did make two deliveries after Christmas (1972) (T. 3481), changing it shortly thereafter to being before Christmas in December, 1972 (T. 3481). These ~~were~~ allegedly 8 ounce and 10 ounce deliveries of cocaine, one occurring allegedly in early December and the other just before Christmas (T. 3484). Parker also indicated that on one of these trips down from Orangeburg, New York, he called Bonilla from a public telephone on the New York State Thruway (T. 3482), while on cross-examination he indicated that although he always used his personal telephone and address book* in making calls in New York, on this occasion

* Government Exhibit #29a, wherein Bonilla's name and telephone number appears.

he either had it memorized or used a piece of paper, although he was not sure of which. He forgot the number and/or lost the alleged paper (T. 4131). This is important because in a close factual case such as this, with substantial and outright mistakes or lies between the two major witnesses, the Government presented an expert witness from New York Telephone Company,* who on counsel's examination proved that in Government Exhibits 81A and 81B,** the telephone listed in Parker's address book which he "always used" for these kind of calls, was not installed until June, 1973.

The other non-testimonial evidence allegedly implicating the defendant in the conspiracy was a lease to his apartment with his name on it,*** and a small piece of paper taken from a co-defendant's home with the words "Spanish Michael" on it.****

* Frank Gutowski was presented as an expert witness to testify about telephone "line cards" and other documents relating to the ordering and installing of telephones for customers to give the jurors a general background for the various telephone documentary Exhibits which the Government placed into evidence (T. 5490-508).

** Exhibits relating to line cards for a telephone listed in Bonilla's wife's name.

*** Government Exhibit #75.

**** Government Exhibit #45c. No testimony regarding this Exhibit was adduced and hence there is no evidence whatsoever that Bonilla had any knowledge about this paper or even knew the other defendant, Joseph Sampson.

There was no evidence of any travel, hotel or car rental documents used in the furtherance of the alleged conspiracy, as there was with so many of the other defendants, no photographs of Bonilla in association with others, no checks, and no telephone toll records of calls made by Bonilla.* There is not a single word of testimony in 9,651 pages that he knew one person in this case other than Jack Brown and Michael Parker.

The remaining bulk of the evidence consisted of witnesses who had absolutely nothing to do with Bonilla. There were Drug Enforcement Agents and Internal Revenue Service Agents who testified about surveillance work they did watching defendants Juan Antonio Alvarez in Florida, and O'Dood and Schennault in Chicago; witnesses who put voluminous amounts of documents into evidence; witnesses who testified about drug and chemical analyses (none of which pertained directly to Bonilla); witnesses who testified about other defendants' prior "similar criminal acts"; witnesses who talked about "money-washing" transactions of large amounts of drug-cash involving Intersimone and Moten; bank officials regarding defendant Moten's illegal money-changing activities with a commercial bank, and witnesses like Marcia Ladd, Anne

* The Government Exhibits in this regard are too numerous to list. They comprise the bulk of the documentary evidence put in by the Government, however.

Reynolds and Lina Gotes who testified for literally hundreds and hundreds of pages about matters that did not add a scintilla of evidence to the record regarding Bonilla, except of course in the Government's theory that since all of this was allegedly relevant for their "massive conspiracy," it should all (or most) be applicable to, and therefore directly held against the defendant Raphael Bonilla. There was also the introduction into evidence of \$13,999 in cash which was seized from defendant Steven "Beansie" Dellacava in 1973 when he was arrested (T. 5652-54).^{*} This had already been used in his previous trial which resulted in his conviction and sentence to 15 years. And yet this man was severed from this case in the Judge's opinion dated June 29 (#44673) because of "authorities cited" to him, although all the horribly damaging and prejudicial testimony about his and severed defendants Guarino and Capra's heroin trafficking and heroin dealings came into evidence --- and was able to be considered prejudicially by the jury against Bonilla.

Numerous motions for severance or mistrials were made by counsel for Bonilla and others, none of which was granted.

Bonilla did not take the witness stand on his own behalf. The jury deliberated seven days before returning verdicts of guilty against 17 of the defendants, acquitting four and being deadlocked as to one, Brightman.

^{*} Government Exhibit #53A-D

POINT ONE

THE COURT ERRED IN DENYING DEFENDANT'S
MOTIONS FOR SEVERANCE (FROM THE INDICT-
MENT AND TRIAL) BECAUSE MULTIPLE
CONSPIRACIES WERE PROVEN, IF ANY, AND
THE DEFENDANT'S RIGHT TO A FAIR TRIAL
WAS SUBSTANTIALLY AFFECTED BY THE
EXTRANEOUS AND PREJUDICIAL SPILLOVER
EVIDENCE.

In this joint trial the defendant Bonilla was tried not only with many large-scale customers of the main witness Jack Brown, but also with large-scale suppliers of heroin and cocaine. In addition, financial adviser and kingpin defendant Frank Moten occupied a prominent place in the testimony at the trial. According to the evidence adduced by the Government, not one of these twenty-one other defendants on trial were known to Bonilla, or had any drug or financial dealings whatsoever with him. He was not involved in any of the testimony regarding the Florida cocaine importers Alvarez and Rodriguez; he was not involved with defendant Intersimone or the severed defendants Capra, Guarino or Dellacava in their heroin dealings; he was not involved with the Chicago group of dealers and Brown customers consisting of O'Dood, Schennault and Al Williams; nor was Bonilla involved in any way with the Washington based dealers and customers of Brown like Joseph and Lois Sampson, Hightower, Foster, Reynolds or Al ("from Norfolk") Jones; nor was Bonilla involved in any

domestic or international financial machinations or schemes that figured so heavily with Moten. In short, Bonilla was allegedly a relatively small-time customer of Jack Brown who knew no one else on trial and who was merely swept away by the Government's tidal wave of evidence, which mostly concerned the other defendants on trial.

By Bonilla's being forced to remain part of a trial of such massive proportions, his rights to a fair trial were substantially affected by the incredible spillover of evidence against other defendants, which spillover included scores and scores of large and small scale heroin and cocaine transactions, acts of murder and violence, repeated acts of illegal financial manipulations, and, of course, constant squabbling in front of the jury between Government counsel and other defendants' counsel. It should also be noted that Bonilla was prejudiced in a multitude of ways by other counsels' intentional (or otherwise) eliciting of his name from Brown and Parker during their cross-examination and also from other counsels' attitudes and tactics during the trial, which could not help but affect the jury's opinion about Bonilla.

If this Court could only have seen the sight of 22 lawyers for defendants and 21 defendants,* plus 3 to 4 Government

* Defendant Juan Antonio Alvarez fled before trial and is still a fugitive at this time.

lawyers, all massed together in one courtroom, with the defendants spilling out to the entire first row of spectators' seats; add to that the presence of numerous Federal Marshals (however, "inconspicuous" they tried to become), plus a large booth for the official Spanish interpreters for N. Alvarez and Rodriguez, then can one truly begin to appreciate the scene at this trial. In a sense the scene in the courtroom by the very size of the room and the very number of defendants all strung together helped unfairly to bolster the Government's case and to give it an unfair advantage. The "massive conspiracy" is "proven" by the massive number of defendants. Cecil B. DeMille himself could not have dreamed up a grander method to help show a "massive conspiracy" than what was done in the trial below. In addition, can one imagine what the jury began to feel for Jack Brown -- no matter how scurrilous and notorious he may have been -- when one attorney after another gets up to question him (totalling 21 attorneys for Brown, I believe) to endeavor to show he is mistaken or lying about certain acts or statements? A certain aura of sympathy must begin to develop, where it might not have, were this a smaller trial. After a while, attorneys become mere badgers constantly pounding away at one "poor" man!

Bonilla made a pre-trial motion for severance, plus

numerous motions throughout the trial for either a mistrial or severance, none of which was granted. These motions were made because it became readily apparent that the Government would inevitably end up attempting to prove, as it did, not one single conspiracy, but a minimum of six separate conspiracies. Hence there was a fatal variance between the indictment and the proof. Kotteakos v. United States, 328 U.S. 750 (1945). It is understood, of course, that even if additional or multiple conspiracies are proven, and even if there is a variance between the indictment and the proof at the trial, the rights of the defendant at trial must have been affected in a substantial way and substantial prejudice must be shown. United States v. Borelli, 435 F.2d 500, 502 (2d Cir., 1970), cert. denied 401 U.S. 946 (1971); United States v. Fantuzzi, 463 F.2d 683 (2d Cir., 1973); United States v. Miley, 513 F.2d 1191, 1207 (2d Cir., 1975; United States v. Bertolotti, 529 F.2d 149 (2d Cir., 1975; United States v. Ricco, Dkt. No. 76-1129, Slip Opinion 6157, (2d Cir., 1977); United States v. Lam, Dkt. No. 75-1435, Slip Opinion 5725 5736-38 (2d Cir., 1977).

As the Court in Bertolotti, supra, at 156 citing Blumenthal v. United States, 332 U.S. 539, 559 (1947) said, "It may generally be conceded that the possibility of prejudice resulting from a variance increased with the number of defendants

tried and the number of conspiracies proven." The Court there discusses the number of conspiracies and defendants involved in various cases before the Supreme Court and also before it in this Circuit. In Bertolotti, the indictment named 29 persons (here 33), with 17 actually going to trial (here 22). In Miley, supra, a five day trial, the Court found no prejudice to a defendant, where there were at least two conspiracies with only five defendants. The Bertolotti trial took four weeks, and the trial in United States v. Sperling, 506 F.2d 1323 (2d Cir., 1974), upon which the Bertolotti Court relied in its "warning" about mass trials such as this, also took only four weeks. This trial took fourteen weeks, over three times as long. As the Court said at 157, "Under the guise of its single conspiracy theory, the Government subjected each of the seven appellants to voluminous testimony relating to unconnected crimes in which he took no part" (emphasis added). This is precisely Bonilla's position in here. He is a minor figure in the Government's eight act drama who, as will be shown was severely prejudiced by the inundation of evidence about other defendants with whom he had absolutely no connection -- save for the Government's "conspiracy theory."

Counsel in his cross-examination of the two major Government witnesses endeavored to remain close to the alleged facts as they affected Bonilla (T. 2349 et seq. - Brown,

T. 4118 et seq. - Parker). He did not bring up the names of other defendants nor implicate them in any fashion. Such was not the case with other counsel, unfortunately. Trial counsel for Moten brought up directly or indirectly, intentionally or unintentionally, (it is hard to tell) Bonilla's name on four separate occasions during her cross-examination of Brown. One in particular involved an act of violence with a gun by Brown and an argument between Bonilla and another person (T. 1596-97). She brought out his name again shortly thereafter, and she even made it appear that Bonilla was aiding and abetting a fugitive (Brown) on these occasions (T. 1603-04, 1616-17). Although no specific objection was taken at the points when the name was brought up, a forceful motion for severance was made shortly thereafter (T. 1628), which was denied. Even if specific objection had been made at the precise mention of Bonilla's name (or alleged alias), the result would have been obvious, from the Court's later comments (T. 4995), when he indicated that it was counsel's own responsibility to put a rein on Moten's counsel not the Court's.* In addition, counsel to Sidney Foster brought out Bonilla's alleged involvement in

* Counsel had asked the Court to restrain Moten's counsel from bringing Bonilla's name up again on her examination. It should also be noted that in another of many instances, Moten's counsel brought out (unfairly) John "Papers" Morris' name (T. 1673). In any event, Moten's trial counsel was an impossible person to restrain.

assisting Brown to remain a fugitive, making Bonilla look like an aider and abettor (T. 2123-24). The Court may ask, "Why didn't counsel move and object immediately." The answer is that counsel to a minor figure is on the horns of a dreadful dilemma in a situation such as this, a dilemma certainly not of his own making. To object only draws further attention to the matter elicited, while to sit quietly is to hope the prejudice will pass relatively quickly. This is something that is inevitable in a trial where there are so many attorneys and defendants involved. The remedy was not for the Court below to commiserate with counsel and say in effect, "That's what happens you know with so many attorneys." The remedy was to have refused to allow so many defendants to go to trial at one time, where the risk is so great of being trod on by other attorneys rushing around on their own clients' behalf. Mr. Justice Jackson stated the matter rather succinctly in his concurring opinion in United States v. Krulewitch, 336 U.S. 440, 453 (1948):

But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words a conspiracy

is often proved by evidence that is admissible only upon the assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury of Blumenthal v. United States, 332 U.S. 539, 559, all practicing lawyers know to be unmitigated fiction.

Other counsel's attitudes and tactics were a repeated source of prejudice to Bonilla. For example, counsel to defendant Morris got what counsel believes to be outrageous sympathy for the witness Ladd* when he was allegedly trying to show that her suicide attempt was phony (T. 5088). Counsel for Dunmore caused an uproar when she was asking the same witness questions about the fighter Muhammed Ali's alleged cocaine-snorting at a party (T. 5107-12). There were a number of minority members on the jury who could not help but be angry and hostile after questions like that, because Ali is almost universally respected in the black community.

The trial was filled with testimony about weapons and murder, none of which involved defendant Bonilla. The testimony about murder and violence permeated the record up to and including the Government's summation. Why did so much evidence about murder come into court? Because other

* Ladd in no way implicated Bonilla with direct evidence, but her testimony of her stealing money from old ladies, etc. and then herself being abused and cheated by Moten made her into a strange and damaging figure generally.

counsel were absolutely insistent on bringing out Jack Brown's state of mind when he was "on the run" in 1975 before he turned himself in. First Joe Paradise was murdered (T. 1044). Brown dropped that himself on the jury as a "harpoon" denounced in United States v. Gregory, 369 F.2d 185,189-90, (D.C. Cir., 1966), which in itself is prejudicial error.* On direct the Government, and on cross-examination, other defense counsel brought out that Brown feared for his life, (whether a real or illusory fear)(T. 1420, 1758). This led other counsel to discuss further whether people were trying to kill him (T. 1790, 2079). Counsel for Schennault went deeper into the morass discussing killers and weapons (T. 2233). Counsel for Morris also went deeper asking if Brown himself were involved in the murders of one "Joe Brown" and "Little Augie" (T. 2321-22). There was additional evidence of murder and violence (over objection) regarding the death of Willie Womack and his girlfriend Louise (T. 540, 533). In addition the Government was allowed to ask over objection about witness Michael Parker's participation in the Government's "Witness Protection Program" (T. 4460). A motion for a mistrial was denied (T. 4467). At about this same time, most unfortunately, a problem seemed to develop with

* See also T. 3753 and 3768 wherein Michael Parker also gave a non-responsive answer to a question which also acted as a most prejudicial "harpoon."

original juror number 10, Mr. Keno, and all of a sudden the United States Marshals were accompanying all jurors to lunch. Is counsel too naive to believe that all this did not infect the jury and affect Mr. Bonilla's chances for a fair trial?

On the Government's redirect, the Court, over objection, ruled that questions about people being murdered could be asked because (other) counsel had aided in opening the door. Thereupon (T. 2944-45) a parade of names was listed by the Government for Brown to say that each one was murdered and that each one had been in the drug business! This was all repeated in the Government's summation (T. 8856-57). To imagine that this sort of material did not inflame the jury and prejudice it against the defendant Bonilla, who as a minor figure, is testified about on direct examination on 22 pages of a 9,691 page trial, is to dream. Can one sincerely believe that the Government wanted all this madness of weapons and violence kept out of the trial? Of course not. It was just waiting and hoping for the chance to put this material in, just waiting for the door that other counsel would open. How does one keep from being swept away in the avalanche of blood and gore? One makes motions for severance, all of which were denied.

During the course of trial there was a tremendous amount of testimony regarding heroin. Brown testified at great

length about his heroin involvement with defendant Intersimone, which began in 1959 (T. 1003-05, 1139). The record was replete with testimony about Brown's heroin dealings with other defendants, and even with other persons not even remotely connected with this case (T. 1034-35), to wit, "Jenks," "Patty Pontiac," "Flo Isabella," "Joe Paradise," "Alphonse" (T. 1043-45, 1072). There were heroin dealings with the Washington, D.C. defendants (T. 1149) and the Chicago defendants (T. 1170). The testimony was spread across the record like the bubonic plague about John ("Johnny Hooks") Capra, Steven ("Beansie") Dellacava and Leoluca Guarino (T. 1109, et seq.). In fact the Government put into evidence the "Capra tapes" and transcripts as Exhibits.* Plus the Dellacava gymbag, \$13,999 in cash, and a heat sealer were all put into evidence and paraded before the jury (T. 5639). Was all this necessary to convict Bonilla who is charged in the conspiracy count plus two cocaine substantive counts? Apparently so, because there was precious little other evidence.

The spillover of evidence from these various conspiracies, i.e., Brown-Florida defendants (cocaine), Brown-Washington, D.C. defendants (cocaine, heroin), Brown-Don Wilson (South Carolina - cocaine), Brown-Dellacava/Guarino/Capra (heroin),

* Numbers 14A, 14, 15A-K

and Brown-Intersimone (heroin), was monumental, devastating and monstrous.* It is precisely this monumental amount of irrelevant and prejudicial evidence that the Courts have been trying to screen from juries in cases such as these with a mass of defendants where the transference of guilt from one "conspiracy", or from other defendants, spills over and infects the jury and absolutely voids its ability to separate matters intelligently. United States v. Bertolotti, supra, at 154 et seq., and United States v. Miley, supra, at 1209 where the Court there said as follows:

The only remaining claim of prejudice is that the trial of one set of conspirators had a spillover effect on the others, an effect which could have been avoided in separate trials. However, this (Miley) was not a case where a minor participant in one conspiracy was forced to sit through weeks of damaging evidence relating to another. The whole trial consumed but 5 days and the crimes of the various appellants were not markedly different.

(Emphasis added)

The Court in United States v. Branker, 395 F.2d 881 (2d Cir., 1968) at 888 also stated it:

This kind of prejudice is particularly injurious to defendants who are charged in only a few of the many

* An example of this lengthy and irrelevant testimony as far as defendant Bonilla was concerned was the witness Lina Gotes (T. 5168-5452). This was very confusing for the jury and motions for severance were made (T. 5440, 5449).

counts, who are involved in only a small portion of the evidence, and who are linked with only one or two of these co-defendants (here NONE). The jury is subjected to weeks of criminal misconduct which do not involve these defendant(s) in any way. As trial days go by, "the mounting proof of the guilt of one is likely to affect another" (Citations)

(Emphasis and parentheses supplied)

Here Bonilla was a minor participant who was forced to sit through approximately 13 weeks (14 including 1 week of jury deliberations) of damaging and prejudicial testimony, save for a few minutes of direct testimony by Brown and Parker only.*

For the reasons that multiple conspiracies were proven and that Bonilla's right to a fair trial was substantially affected by spillover evidence from other conspiracies proved within, his conviction should be reversed.

* It should be noted that there are no overt acts out of 47 in the indictment that mention Bonilla, and he was the final defendant in counts 39 and 40. It is almost as if he were tacked onto this case as an afterthought by the Government.

POINT TWO

THE EVIDENCE WAS INSUFFICIENT TO
CONVICT ON COUNT 1 (CONSPIRACY)
AND COUNT 29 (SUBSTANTIVE), AND
COUNSEL'S F.R.C.P. RULE 29 MOTION
SHOULD HAVE BEEN GRANTED

The only evidence that was adduced against defendant Bonilla has been described in the statement of facts (Br. pp. 2 to 9) and in Point One (Br. pp. 10 to 22). The defendant was not engaged in financial dealings or large scale drug dealings that would allow the inference that he knew that a wide ranging conspiracy dealing in vast quantities was underfoot. He may not be presumed from 8 ounce and 10 ounce alleged transactions that he was involving himself in this "massive conspiracy." The quantities involved do not allow such an inference of conspiratorial involvement with international suppliers and smugglers. United States v. Miley, supra, at 1207 (relatively small amounts of LSD); United States v. Ortega-Alvarez, 506 F.2d 455, 457 (2d Cir., 1974)(1 kilo quantities of heroin, with knowledge of 45 kilo shipment); United States v. Magnano, Dkt. No. 76-1011, Slip Opinion, 5471 (2d Cir., 1976)(pounds of heroin). Based upon the lack of direct evidence indicating knowledge on the defendant's part of a vast conspiracy, coupled with the inconsistencies, mistakes, or outright lies in the record

between the major issues, there was insufficient evidence as a matter of law to send the case to the jury. The fact that the defendant was acquitted on count 30, only buttresses the fact that the Judge erred in submitting the case to the jury. The arguments made on Point One regarding prejudice in the record allow an inference that on Count 1 and 29, the defendant was swept along by the mass of unrelated evidence.

POINT THREE

STATEMENTS BY THE PROSECUTOR IN SUMMATION AMOUNTED TO PROSECUTORIAL MISCONDUCT AND PREJUDICED BONILLA'S RIGHT TO A FAIR TRIAL

The problems relating to defending a minor defendant in a 22 defendant trial were explored in Point One (Br. pp. 10 to 22) in one context. Counsel has to decide on a tactical approach, i.e., whether to play the matter in a "low-keyed" fashion or to attack all out as if one were defending Moten, Rodriguez, Schennault or other "lead" defendants. For obvious reasons in this case, because of the paucity of evidence against Bonilla in the record, the former approach was taken. It made absolutely no sense in a situation where so little evidence was adduced against Bonilla to endeavor to keep his name in the "forefront" so-to-speak by acting as a "lead counsel."

Unfortunately all counsel, no matter what they did in this trial, were all tarred with the same brush in remarks by the Government during its summation. Some of the Government's remarks only highlighted absolutely the difficulties faced by a defendant in defending himself when he is strung together with 21 other persons. The Government knows very well of these difficulties for defense counsel when so many attorneys are present in one room, representing,

in themselves, different generations, different lifestyles, attitudes, abilities, and tactical approaches to a common problem, i.e., how best to defend your one client when so many competing interests are present.

Unfortunately again, for the defendant Bonilla, the Government was able to capitalize on these very problems, which the Government (not the Grand Jury!) caused by having so many disparate defendants and attorneys in one place at one time. It intentionally used these very problems of counsel to its own tactical advantage to the detriment and prejudice of many of the defendants, more specifically Bonilla, and then turned around and said, "I was only responding to counsel!" While, the Government is really only responding to some or few counsel in its remarks during summation, all counsel are affected. One can imagine and hear, really, the conversations before and during trial of the Government's prosecutors in stating to each other, "I can hardly wait to see how defense counsel start stepping all over each other and how some start opening doors for us to get back at all of the defendants. Boy, that's one of the marvels of these massive conspiracy trials. They give us so much leeway to get everyone because of the tactics, stupidity, and actions of some of the defense counsel."

Did the above conversation take place with regard to

this case? Is part of the intent on the Government to do the above? The questions are rhetorical, but the answers supply themselves, and in the long-run the result is the same for defendants.

In the rebuttal summation by the Government, it unfairly attacked counsel indirectly for what we did not do in whom we questioned and cross-examined. This particularly came out in regard to Government witness Anne Reynolds when the Government accused counsel by implication that we were not doing our job in going after the witnesses (T. 8633).^{*} It would have been the absolute height of foolishness for Bonilla's defense to attack every single witness who did not even mention him, like Reynolds, Ladd, Sureda, ad infinitum. And yet, all of their testimony, with limited exceptions, can, because of the "conspiracy theory," be utilized and considered by the jury against Bonilla. We are damned if we do, and damned if we don't. The Judge did not cure this error with instruction (T. 8646-47).

Further at (T. 8651), the Government argued and impaled counsel with the ludicrous arguments that Cowper's attorney

* In essence this amounted to an indirect but clear attack on the defendant's right not to testify and his right to remain silent during the trial. This is improper. United States ex rel. D'Ambrosio v. Fay, 349 F.2d 957, 960-61 (2d Cir., 1965), cert. denied, 382 U.S. 921.

made in summation before the jury about "Juror No. 1 and No. 3" conspiring together, which argument was objected to and scorned by all other counsel. The door was opened by one counsel, and the Government walked through to attack all.

Later the Government, over heated objection, repeatedly and constantly attacked all counsel and lectured the jury on what the job of defense counsel is and that its job is to "get their man off" (T. 8658, 8660). The Government accused defense counsel of coming into Court and saying "whatever" we have to say to get our clients off (T. 8679). That amounted to a personal attack on all counsel, regardless of how the individual defenses had been conducted, in order to inflame the jurors against the counsel and defendants. Government counsel also went outside the record (T. 8659) far exceeding normal summation rhetoric to state that never had there been an attorney in history who did not do such things. Government counsel not only brought its own credibility into play on a number of occasions, concededly to rebut other counsel's argument, but it also brought the Court's credibility unfairly into the jurors deliberative process, which was objected to (T. 8894, 8897).

The Government brings an indictment like this pitting counsel against each other, knowing full well that problems will arise because of competing interests, and then comments

on it to the detriment of the defendants, more specifically Bonilla. When the evidence is close factually, as counsel believes it was here, such unfair arguments can not help but persuade the jurors to convict.

Counsel concedes that some other counsel in their examination of witnesses and in closing argument attacked the Government's integrity in utilizing admitted perjurers such as Brown and Ladd, however, this counsel did not. Almost exclusively in cross-examination and argument were the facts argued as applying to Bonilla. Unfortunately, when the Government responds to other counsel's blasphemies, we all get damned. United States v. White, 486 F.2d 62 (2d Cir., 1973); United States v. Drummond, 481 F.2d 62 (2d Cir., 1973). The Government's responses were improper, inappropriate, and prejudicial to Bonilla, particularly since the evidence against him was so limited and so slim. Comments such as the ones before-noted could and probably did fatally prejudice the jury against Bonilla's case.

POINT FOUR

THE COURT IMPROPERLY HELD NUMEROUS EX
PARTE DISCUSSIONS WITH GOVERNMENT COUNSEL
AND ORDERED THE RECORD SEALED WITHOUT
ALLOWING DEFENSE COUNSEL TO PARTICIPATE

On at least eleven occasions the Court below held ex parte proceedings with Government counsel and ordered the record either sealed or not transcribed:

- 1) T.-1562-63: Alleged "3500 material" given to Court. Record sealed.
- 2) T.-2069: Possible Government Exhibit becoming Court's Exhibit #4 was reviewed. Record not transcribed.
- 3) T.-3876: Submission by Government ex parte of D.E.A. agent's memo notes as possible "3500 material." Record not transcribed.
- 4) T.-4177-4193: All pages "sealed by Court Order."
- 5) T.-4300-4303: "Sealed by Order of the Court."
- 6) T.-4769: Record sealed and not transcribed.
- 7) T.-5009: Discussion in Robing Room ordered not transcribed.
- 8) T.-5032: Known ex parte discussion with Court and Government counsel off record, not transcribed and sealed.
- 9) T.-5676: Ex parte discussion with Government counsel. Record sealed.
- 10) T.-5727: In camera conference regarding Government Exhibit 3540-B. Record sealed and exhibit sealed.
- 11) T.-7991-93: Discussion in Robing Room; sealed.

While having the greatest of respect for the integrity of this Court, counsel submits that it is error for the Court to have held any, or so many, ex parte, in camera and non-transcribed conferences with the Government counsel. The Court did not inform counsel of the nature of these conferences and indicated in fact that counsel did not need to know (T. 4345). Objection was taken on a number of occasions to such situations (T. 4344, 5133). It was indicated that if and when a need to know arose, counsel would be apprised. This is not the Military Intelligence Corps or Central Intelligence Agency, where classified matters are disseminated on a "need to know basis," but a group of defendants on trial in a United States Courthouse with the right to confront their accusers and with the right to have their trial presided over by a Judge uninfluenced by the Government in ex parte and in camera proceedings. It is submitted that argument by defense counsel on various subject matters discussed could conceivably have altered the Court's decision, or the course of counsel's conduct at trial, with the resulting outcome being different. This may be particularly true with regard to the Government's proposed 3500 material which was submitted. As far as the other conferences are concerned, counsel at the moment are still shooting in the dark, so to speak, even on appeal to this Court, since the records are sealed.

While counsel is not alleging that the conduct was

unethical between the Court and the Assistant United States Attorney, the Code of Professional Responsibility provides as follows:

Canon 7 -

A lawyer should represent a client zealously within the bounds of the law.

EC 7-35 -

All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

DR 7-110 -

Contact with Officials
(B)(1)-(4)

In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate,

as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) In the course of official proceedings in the cause.

(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(4) As otherwise authorized by law, or by Section A(4) under Canon 3 of the Code of Judicial Conduct.

The Canons of Judicial Ethics, Canon 3(A)(4) provides further:

A Judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

Rule 44 of the Federal Rules of Criminal Procedure, while not precisely on point, have a clear meaning and intent,

i.e., that an indigent is "entitled to have counsel ... represent him at every stage of the proceedings ...unless he waives such (representation)." Bonilla did not waive my presence at such meetings.

It would appear therefore that the activities of the Government in coordination with the Court have deprived the defendant of his right to confrontation of his accusers, the effective assistance of counsel and due process as accorded in Amendments 6 and 14 of the United States Constitution. Ex parte proceedings have no place within the context of a seriously and closely-litigated criminal proceeding. The joint actions of the Court and the Government made it impossible adequately to protect the rights of the defendant Bonilla. A reversal is required, or in the alternative a remand hearing is necessary to explore the matters which were sealed, after they have been unsealed, properly transcribed, and made available to counsel.

POINT FIVE

THE DEFENDANT-APPELLANT ADOPTS THE
POINTS OF OTHER COUNSEL APPLICABLE
TO HIM PURSUANT TO RULE 28(i), F.R.A.P.

CONCLUSION

The Government's case against the defendant Bonilla was insufficient. There were multiple conspiracies proven, if any, which resulted in his inability to receive a fair trial because of substantial prejudice of spillover evidence. Coupled with the prosecutor's arguments in summation, the above noted Points, singularly or in combination, require the judgment to be reversed.

Respectfully submitted,

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Dated: New York, New York
April 13, 1977

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